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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978.

**No. 78-1945**

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
*Petitioner,*

*vs.*

STANLEY E. COUTU, ET AL.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF OF PETITIONER

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## BRIEF OF PETITIONER

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## OPINIONS BELOW

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The opinion of the Court of Appeals is reported at 595 F. 2d 396 and is reproduced in the Appendix at pp. 35-46. Two opinions entered by the District Court are reproduced in the Appendix at pp. 20-29 (McGarr, J., entered October 8, 1975) and at pp. 30-34 (Leighton, J., entered November 29, 1977).

## JURISDICTION

The opinion of the Court of Appeals was filed on April 4, 1979; a petition for writ of certiorari was timely filed on June 30, 1979. This Court granted the writ on March 17, 1980 and has jurisdiction under 28 U. S. C. § 1254(1).

## QUESTION PRESENTED

Whether Congress, through the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*, has conferred upon the Federal Courts jurisdiction to alter the terms and conditions of a contract between an agency of the United States Government and its private contractor upon suit against the contractor by one of its employees after the work in question has been performed. Integral to the question presented is the issue—addressed by the United States in urging as *Amicus Curiae* that the Court grant the petition for writ of certiorari—whether a federal contractor employee has an implied right of action under that Act to maintain suit in federal court alleging failure to pay prevailing wage rates for work performed under a federal contract which does not specify that such rates be paid.

## STATUTORY PROVISIONS INVOLVED

The Davis-Bacon Act, as amended, is set forth in the Appendix, pp. 48-53.

## STATEMENT OF THE CASE

Petitioner, Universities Research Association, Inc. (hereinafter "URA"), is a not-for-profit incorporated association of North American universities organized to contract with the United States. Since 1967, URA has been party to a succession of contracts with agencies directed by Congress to foster high-energy physics research. Those contracts were made to facilitate construction, operation, maintenance and administration of the Fermi National Accelerator Laboratory—a 6800 acre site located in Kane and DuPage counties, Illinois, on which are located research laboratories and offices, support facilities and an extensive proton accelerator system—known as "Fermilab." The original contract, numbered AT (49-8)-3000, was between URA and the Atomic Energy Commission ("AEC") acting pursuant to the Atomic Energy Act of 1954, 42 U. S. C. § 2051. The authorities and responsibilities of the Atomic Energy Commission were later redelegated to the Energy Research and Development Agency ("ERDA") (see Energy Reorganization Act of 1974, 42 U. S. C. (Supp. V) 5801 *et seq.*) which assumed and reissued the contract under number EY-76-C-02-300. Recently, the Department of Energy ("DOE") has assumed ERDA's authorities and responsibilities. Since the facts giving rise to this lawsuit occurred during the existence of the AEC and ERDA, the contracting agency will be referred to herein as "AEC/ERDA." (App. 54)

In all respects pertinent to this case, the contract has remained unchanged throughout the succession of contracting agencies and will be referred to herein as "the contract."

The contract obligated URA, drawing upon the resources of its member institutions, to provide scientific and management services to AEC/ERDA in connection with the Fermilab project.

All funds required for those purposes, including funds to compensate persons employed by URA to carry out its contract responsibilities at Fermilab, have been provided by the United States through its contracting agencies, AEC/ERDA.[1] URA is a not-for-profit entity and receives no unrestricted compensation for its services; while it does receive a fixed "management fee," the fee must be applied to purposes expressly described in the contract and related to furtherance of the functions of Fermilab (*e.g.*, to sponsor symposia, pay travel expenses of visiting scientists, etc.).

Respondent, Stanley Coutu, was employed by URA at Fermilab as an electronics technician during a three-year period, September 25, 1972—September 10, 1975, pursuant to the contract. Relative to wages of electronics technicians and others employed at Fermilab by URA, the contract and Appendix B thereof lists all of the job classifications URA may employ, including several technician grades, and lists as allowable costs the wage and salary rates URA is authorized to pay for work performed in those classifications. (App. 54-59). Respondent's depositions of AEC/ERDA and URA officials revealed that URA is required under the contract to secure AEC/ERDA approval prior to adopting new classifications or making any changes in employee compensation. (Kennedy Dep. 79-83; Orr Dep. 17, 21; Carrigan Dep. 10, 50; Marofske Dep. 11, 23, 28-30.)[2]

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1. The contract terms were taken from AEC/ERDA procurement regulations codified at 41 CFR Part 9, originally promulgated by the AEC pursuant to authority granted by Congress in the Atomic Energy Act of 1954, 42 U. S. C. § 2201(p). Funds provided by the government are deposited in local bank accounts upon which URA may draw, subject to audit and restrictions of the contract.

2. Deponent Kennedy is an official of the contracting agency; deponents Orr, Carrigan and Marofske were, at times relevant, employed by URA as Business Manager, Director of Personnel Services, and Personnel Manager for Fermilab operations, respectively.

Relative to the Davis-Bacon Act, the contract provides:

> "This contract does not contemplate the performance of work by the Association [URA], with its own employees, which the Commission [AEC/ERDA] determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work."
>
> (As found by the lower courts, App. 22, 32, 39, 55)

In accord with the foregoing provision, physical construction of the Fermilab complex was accomplished by a joint venture of private architectural, engineering and construction firms (known collectively as "DUSAF") pursuant to a contract between the joint venture and AEC/ERDA (#AT(04-3)-603) effective July 1, 1965 and later reissued as a subcontract to the URA-AEC/ERDA contract (subcontract #68-1). Construction was commenced in 1968 and was essentially completed prior to September, 1972 (Orr Dep. p. 36).[3]

The quoted provision of the URA-AEC/ERDA contract regarding work determined by AEC/ERDA to be subject to the Davis-Bacon Act has been administered by a committee of AEC/ERDA officials (Kennedy Dep. 42, 46-48, 75; Orr Dep. 82-84). That agency maintained an office at Fermilab which, during the period relevant herein, was staffed by from 15-20 officials responsible, in part, for ensuring compliance with the Act (Kennedy Dep. 88-90).

Agency determinations as to Davis-Bacon Act coverage and classifications of work thereunder are governed by AEC/ERDA regulations (41 CFR 9-18.701, 704, 750), many of which have been approved by the U. S. Department of Labor—see

3. Appropriations for construction funds were enacted in 1967 and 1968. P. L. 90-56, 81 Stat. 124; P. L. 91-44, 83 Stat. 46.

Brief for the United States as Amicus Curiae, pp. 18-19—as the Executive agency entrusted with administration of the Act pursuant to the Reorganization Plan of 1950 (64 Stat. 1267; 5 U. S. C. Appendix). Provision is made by AEC/ERDA and Department of Labor Regulations for appeals from contracting agency decisions respecting Davis-Bacon Act coverage. 41 CFR § 7.10; 29 CFR Part 5, §§ 5.6(a) (3), (c), 5.11. *See, e.g., In Re Stanford Linear Accelerator,* 16 Wage-Hour Cases 851-57 (BNA, 1965).[4]

Mr. Coutu filed the instant action on April 9, 1975 in the form of a seven count complaint charging URA with failure to make proper wage payments (App. 3-12). As revealed on deposition, Mr. Coutu does not deny that he was employed as an electronics technician nor that he was paid at rates applicable to that classification as specified in the contract; rather, his complaint is that he should have been paid at rates then prevailing in the area for construction workers (*i.e.,* rates contemplated under that portion of the Davis-Bacon Act which refers to "wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a similar character . . .") (Coutu Dep. ff).[5] Count I poses the claim in context of the Davis Bacon Act without regard to contract commitments or limitations; Count II charges that the contract itself obligated

4. The foregoing decision and appeal process has been recognized by various courts: *North Georgia Building and Construction Trades Council* v. *U. S. Department of Transportation,* 399 F. Supp. 58 (N. D. Ga. 1973); *Framlau Corp.* v. *Dembling,* 360 F. Supp. 806 (E. D. Pa. 1973); *International Union of Operating Engineers,* 355 F. Supp. 7 (W. D. Okla. 1972), *aff'd,* 480 F. 2d 603 (10th Cir. 1973).

5. From the Coutu deposition, it appears that the electronics technician job principally involved monitoring of computers, providing assistance to scientists, supervising accelerator operation and other such work which can hardly be described as "construction"; he contends that he also, from time to time, performed other tasks which he felt constituted "construction" work. (Coutu Dep. ff). If the case were to be heard, therefore, a lengthy inquiry into each day's work activity would be required.

URA to pay the wages claimed; the remaining counts are based on common law theories.

On October 8, 1975, the District Court dismissed Count I of the Complaint, noting the contract wage provisions, the absence in the contract of any Davis-Bacon Act prevailing wage stipulation, and the contract provision quoted above (App. 25, 28-29). The Court explained its decision by stating:

> "The defendant in its memorandum has soundly argued the position that the administrative determinations of the contracting agency are subject only to review by the Secretary of Labor . . . and in certain instances are appealable to the Wage Appeals Board of the U. S. Department of Labor. . . ."
>
> (App. 22)[6]

The Court described the posture of the case after dismissing Count I, as follows:

> "[T]he Court is apprised of a correspondence between [URA] and [AEC/ERDA] dated April 6, 1972, which has seemingly been incorporated into the alleged contract. This correspondence leaves open the possibility of performing Davis-Bacon Act work by defendant's employees pursuant to proper Davis-Bacon Act determinations by ERDA with regard to the work performed, and pursuant to appropriate modification of the contract. . . .
>
> "The Court is thus presented with factual considerations as to the existence of Davis-Bacon Act determinations by ERDA. . . .
>
> "This Court does not seek to review the determinations of the Secretary of Labor or of the contracting agency; rather, the Court gives plaintiff leave to show that the Secretary of

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6. The District Court later characterized the dismissed Count I as follows:

> "In Count I, plaintiff class purported to state a claim on the theory that defendant failed to compensate plaintiff class in accordance with the prevailing rate determinations made by the Secretary of Labor pursuant to the authorization of the Davis-Bacon Act, whether or not the wage determinations were incorporated in the contract. This count was dismissed. . . ." (App. 30-31).

> Labor through ERDA has made Davis-Bacon Act determinations with respect to the alleged contract, and that plaintiff and the class have performed such work at defendant's direction, pursuant to the contract."
>
> (App. 24-25)

The District Court thus ruled that the plaintiff would be entitled to relief only if he could show, under Count II of his complaint, that AEC/ERDA had issued determinations that work to be performed by the Plaintiff was subject to the Act; the Court held that it did not have jurisdiction to make such determinations or otherwise interfere with the agencies' decisions.

After Count I was dismissed, URA answered Count II and the remaining counts of the complaint (App. 13-19) denying, *inter alia,* that AEC/ERDA had made any determination that the work performed by Mr. Coutu under the contract was to be considered subject to the Davis-Bacon Act. Following a number of depositions and after making inquiry via the Freedom of Information Act, Respondent Coutu—as later noted by the District Court—was forced to concede that he could not show that AEC/ERDA had determined that his work was subject to the Davis-Bacon Act nor that the contract included any Davis-Bacon Act specifications (App. 32). Thereupon, on URA's motion for summary judgment accompanied by the affidavit of its chief legal officer that no Davis-Bacon Act determinations have been made part of the contract (App. 31-32, 37-38), the District Court dismissed the complaint in its entirety, holding (App. 32-33):

> "On the present state of the record it is clear that no Davis-Bacon Act determinations have been made a part of this contract, requiring defendant to pay plaintiff class at wage rates contemplated by the Davis-Bacon Act. The only issue is whether plaintiff class can proceed in this action under the Davis-Bacon Act absent any showing that the government and defendant have made a determination that the contract is subject to the Act's provisions. An examination of the contract, the Act, and the relevant

> regulations reveals that defendant's motion for summary judgment must be granted. There is no issue of material fact and defendant is entitled to judgment on Count II as a matter of law."

The Court continued, by noting:

> ". . . The determination of whether a contract is subject to the Act is made by the agency which is contracting on behalf of the United States government and the decision must be made in accordance with applicable regulations. 41 C. F. R. § 1-18.701-1, 1-18.701-2, 9-18.700(b). The contracting agency in this case has formal guidelines and a Davis-Bacon Committee for determining what work is subject to the Act. [Kennedy Dep. 42, 46-48, 75]. Any dispute regarding the application of the Act is referable to the Secretary of Labor for an authoritative ruling. 29 C. F. R. 5.12. The efficacy of the Act hinges on minimum wage determinations by the Secretary of Labor and the incorporation of minimum wage specifications in the contract. [citations omitted]
>
> "After examination of the statutory and regulatory framework, it becomes clear that it would be improper for this court to declare in the first instance that this contract is now subject to the Davis-Bacon Act and to make appropriate wage determinations for the parties."
>
> (App. 33-34)

The Court of Appeals for the Seventh Circuit reversed. It held that neither the absence of any AEC/ERDA determinations relative to Respondent's work, nor the absence of Davis-Bacon Act specifications in the contract, nor the post-contracting posture of the case barred the lawsuit. It held further that if the District Court were to determine that Respondent and his class had performed "construction, alteration or repair work" at Fermilab they would be entitled to compensation based on prevailing rates (App. 45-46). The Court did not describe any standard by which the District Court is to evaluate Respondent's work to determine whether it was "construction, alteration or repair," or whether the Respondent in fact worked as a

"mechanic" or "laborer," within the meaning of the Act; the Court's opinion equivocates on that point. Thus, although both District Court opinions are premised on the understanding that the Court had no jurisdiction to make a coverage determination for the parties and/or to amend the contract based on such determination, the Court of Appeals first held—after implying agreement with the premise—that the issue was not before it (App. 38 at footnote 6). Then, however, the Court proceeded to direct the District Court to grant relief if the District Court were to find that plaintiff had performed "construction" work. (App. 45-46).

Obviously, however, a coverage determination is the critical element in the case. Without a coverage determination, one cannot determine whether Respondent is entitled to any relief at all, much less what, if any, particular "prevailing rate" classification would be appropriate to his work (noting that even by Respondent's estimation, a substantial portion of his job was computer-monitoring and similar work not even remotely covered by typical Department of Labor prevailing rate determinations—cf. 42 F. R. 30108-30111, cited by the Court of Appeals as an example thereof). The Court of Appeals' equivocation as to how, or by whom, a determination must be made whether Plaintiff's work was subject to the Act, or how such work should be classified, flaws the entire opinion.

Similarly, and although the Court remanded the case to the District Court with instructions to award damages in the event it found that URA had used Respondent to perform "construction" work (App. 45-46), it elsewhere noted that: "it is not clear that such a contractor [URA-a not for profit entity] can or should be required to make restitution out of its own unrelated funds." (App. 43-44 at footnote 11). The Court also dismissed the idea that Respondent at least ought to have first raised his complaint with the contracting agency, or the Department of Labor, prior to filing suit, by noting there was no

controversy between URA and AEC/ERDA that the work was not covered by the Act (App. 43-44 at footnote 13).

The Court concluded that under its prior decisions in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975), *vacated and remanded* 423 U. S. 810 (1975), *reaffirmed on remand*, 548 F. 2d 689 (1977) *cert. den.* 434 U. S. 1033 (1978), the Act conferred on the District Court's jurisdiction to entertain an employee's suit for recovery of "prevailing wages" regardless whether or not the agency or Department of Labor had determined that the Act applied and despite the absence of any express contract to pay such wages. It held that the obligation was part of the contract as a matter of law. (App. 39)

## SUMMARY OF ARGUMENT

The Davis-Bacon Act does not operate to require payment of wages at "prevailing rates" for work performed under a government contract in the absence of a positive determination that such work is covered by the Act. The Act requires that such coverage determination must be made *prior to contracting*. The determination must be then incorporated into the contract, along with job classification and wage rate schedules determined to be applicable, and provisions for enforcement. Responsibilities for making the coverage, classification and rate determinations upon which the Act operates and is conditioned have been vested by Congress and delegated by the Department of Labor, via authorized regulation, in and to the contracting agencies; determinations made by the agencies are subject to review only by the Department of Labor and Comptroller General.

The effect of the Court of Appeals' decision will be to permit the District Court, in a private action, to make *de novo*, and *post-contracting* coverage, classification and rate determinations for the contracting agency and to enforce such determinations retrospectively upon a contractor whose contract affirmatively recites that work performed under it is not subject to the Act. Yet, the Act, its legislative history, and all previous judicial and administrative interpretations of the Act show that Congress did not intend to vest the federal Courts with jurisdiction even to *review* the agency and Department of Labor determinations upon which the Act is premised, much less jurisdiction to render such determinations *de novo* after work has been completed. The scheme of the Act and its legislative history show that Congress did not intend that it would be enforced through private rights of action.

The Court of Appeals decision ignores the literal terms of the Act, ignores all other indicia of Congressional intent, overrules a forty-year long history of administrative application, and is contrary to rulings of this Court and all other judicial opinion. If not reversed, the Court of Appeals' decision will seriously destabilize government contracting.

## ARGUMENT

### I.

### THE FEDERAL COURTS DO NOT HAVE JURISDICTION TO MAKE COVERAGE, CLASSIFICATION, OR WAGE RATE DETERMINATIONS UNDER THE ACT

The Court of Appeals' opinion concludes with the proposition that if the Respondent by discovery or other means can determine that he performed construction, alteration or repair work at Fermilab, he may claim wage payments at "prevailing rates." (App. 45-46). A necessary consequence of the Court of Appeals' holding is to require the District Court to decide, without regard to the position of the contracting agency and contrary to the terms of an express contract: what work was, or was not, "construction, alteration and/or repair" work within the meaning of the Act; whether Respondent performed such work as a "mechanic" or as a "laborer"; which grade or classification Respondent worked within; and which "prevailing rate" was applicable to his work, if any. Such questions are especially complex in this case because this Respondent was employed by URA as an electronics technician charged with monitoring computers, assisting scientists and engineers in setting up and conducting experiments in high energy physics and supervising accelerator operation. As pointed out by the Solicitor General in the Brief for United States as *Amicus,* highly sophisticated judgments must be made in order to distinguish construction work from non-covered scientific research, experimental, and technical work. Brief for U. S., pp. 18-19 at footnote 15.

The core question, then, is whether or not the Act confers jurisdiction upon the Federal Courts independent of any AEC/ERDA or Department of Labor prior determinations, to deter-

mine *de novo* and post-contracting that such work is covered by the Davis-Bacon Act or to establish a classification rate for such work. We submit, respectfully, that the Act does not confer such jurisdiction.

## A. The Legislative History of the Act Belies the Jurisdiction Recognized by the Court of Appeals

The original Davis-Bacon Act, enacted by Congress in 1931, provided unequivocably that the wages paid on certain federal construction projects "shall not be less than the prevailing rate of wages."[7] It contained only limited provisions relating to coverage, classification, or wage determinations, and provided no enforcement procedures. In 1932, Congress passed an amendment to provide for the imposition of fines and deductions on any contractor violating the Act;[8] the amendment was vetoed.[9]

Subsequently, in 1935, Congress enacted another amendment to the Act which introduced the concepts of *administrative predetermination* of coverage and rates and a prescribed enforcement scheme.[10] Thus amended, the Act provided that bidders on government contracts were to be advised in advance of the minimum wage provisions upon which their bids were to be based; further, the amended Act provided a detailed enforcement plan permitting the government to cancel contracts for noncompliance with the Act,[11] a new Section 3(a), authorizing the Comptroller General to withhold payments to contractors,[12] and a new Section 3(b), granting laborers and mechanics a

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7. Davis-Bacon Act of 1931, Chap. 411, § 1, 46 Stat. 1494.
8. S. 3847, 71st Cong. (1932).
9. See Veto Message (S. Doc. No. 134) (1932).
10. 40 U. S. C. §§ 276a-276a-2(b).
11. 40 U. S. C. § 276a-1.
12. 40 U. S. C. § 276a-2(a).

limited right to recover wages against the Miller Act bond.[13] Congress has not changed these provisions of the Davis Bacon Act since they were adopted.

Congress has, however, *considered and rejected* proposed legislation which, if enacted, would have lent support to the Court of Appeals' decision. In 1962 and 1963, the House Special Subcommittee on Labor held extensive hearings on various proposed amendments to the Davis-Bacon Act.[14] Among the legislative measures considered by the Subcommittee were two bills sponsored by Congressman Charles E. Goodell of New York. Those measures, if enacted, would have amended the Davis-Bacon Act to provide extensive judicial review of administrative determinations rendered thereunder and would have provided a private right of action in federal court to enforce the Act.[15]

Relevant provisions of H. R. 9590, proposed by Congressman Goodell, debated by Congress, were as follows:

> Sec. 7. (a) *Whenever it is claimed that any contractor or subcontractor has refused or failed to pay the wages that he is required to pay by reason of a wage determination issued* by the Secretary of Labor [under the Davis-Bacon Act] to employees . . . the contracting agency shall investigate the claim . . . and . . . shall either deny or sustain such claim.
>
> * * *
>
> "(c) *Any employee aggrieved or adversely affected by any ruling made pursuant to subsection (a) of this section may bring an action in the United States district Court* . . . against the contractor . . . to recover the amount of unpaid wages due under this Act. . . .
>
> "(d) In any action brought pursuant to subsection (b) or (c) of this section, the court shall have authority to

13. 40 U. S. C. § 276a-2(b).

14. Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 2d Sess. (1962).

15. H. R. 11115, 87th Cong., 2d Sess. (1962), and an amended version, H. R. 9590, 88th Cong., 2d Sess. (1963).

> determine the obligations of the contractor or subcontractor under the wage provisions of his contract, and whether or not the contractor or subcontractor has failed to comply with them. . . ." (Emphasis added.)[16]

Additionally, H. R. 9590 would have further amended the Act by adding a new Section 8 to provide for judicial review of wage determinations as follows:

> "Sec. 8. (a) Any person aggrieved by a wage determination for laborers or mechanics issued pursuant to this Act . . . may obtain judicial review of such determination in an action against the Secretary of Labor and the contracting agency in a district court of the United States.
>
> * * *
>
> "(c) At the conclusion of any hearing on the merits, the court shall, in any case in which it finds that the prevailing wage originally promulgated was not determined in accordance with law, establish such prevailing wage as it deems to be in accordance wth law."[17]

If the plain language of these proposed amendments is not sufficiently clear to show that Congress has been presented with proposals to provide for judicial intervention in the administration of the Act, Congressman Goodell's explanation of its intended purpose should leave no doubt:

> "The judicial review section which I am offering permits an aggrieved individual who feels that the determination of the Secretary of Labor is erroneous to bring an action in federal court. . . ."[18]

The proposed amendments were rejected by the Committee and later by Congress following extensive debate. Thus, at the conclusion of hearings on the proposals for judicial review, the

16. H. R. 9590, 99th Cong., 2d Sess., §§ 7(a), (c) and (d) (1964).

17. H. R. 9590, 88th Cong., 2d Sess., §§ 8(a) and (c) (1964).

18. 88 Cong. Rec. 1227 (1964) (remarks by Congressman Goodell).

Committee Chairman issued a Majority Report rejecting the concept of judicial review as embodied in the Goodell bill.[19] In recommending that the House reject amendments adding judicial review to the Act, the Majority Report stated:

> "[J]udicial review of wage determinations under the Davis-Bacon Act is *simply not practicable* and, in fact, could *frustrate the entire program.*" (Emphasis added.)[20]

The Majority Report went on to note that some form of review of wage determinations should be provided; it concluded, however, that "administrative improvements rather than a legislative solution provide the best approach."[21] The Majority Report then observed that the Secretary of Labor had recently established a Wage Appeals Board having jurisdiction over "all significant questions under these labor standard statutes" and concluded:

> "The Committee is confident that this Board offers the necessary procedural protections for interested parties, *without impeding the operation of our construction programs.*[22]
>
> * * * * *
>
> "In enforcement cases, the Board is empowered to review potential debarment cases on the record after full opportunity to be heard has been extended to any contractor or subcontract. The committee believes that the effectiveness and adequacy of this administrative approach should be thoroughly tested before consideration is given to other measures." (Emphasis added.)[23]

The Report makes clear the fact that the majority of the Committee, whose views were ultimately ratified by the House, considered provision for judicial review inimical to the various

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19. H. R. Rep. No. 308, 88th Cong., 1st Sess. (1964).
20. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 4 (1964).
21. *Ibid.*
22. *Ibid.*
23. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 5 (1964).

interests promoted under the Act and urged rejection of the concept. Furthermore, it is equally clear from the acrimonious comments contained in the majority views, in which Congressman Goodell joined, that no provision of the Davis-Bacon Act then (or now) provided the District Courts with jurisdiction to make Davis-Bacon Act determinations; *e.g.*:

> "At the present time, every finding of the Secretary of Labor, with or without an investigation and with or without a hearing, is final. Neither employees or employers have any recourse except to beg the Secretary for mercy, or perhaps prevail upon their Congressman to intervene. It is an intolerable situation for such arbitrary and final authority to be lodged in a single administrator."[24]

When the amendments were reported out of committee and debated on the House floor, Congressman Goodell and his colleagues once again attempted to confer on affected parties broad recourse to the courts via the above-quoted proposed amendment to the Act. The debate on the House floor and ensuing defeat of Congressman Goodell's proposed amendments[26] reveals that Congress intended to provide no such recourse. Reflecting views of the majority, Congressman Fogarty argued as follows:

> "What will the Goodell amendment do? This is what it will do. It will allow any contractor or subcontractor, bidder or prospective bidder, employee or prospective employee and so far as the bill is concerned, almost anyone who regards himself adversely affected by the Secretary's wage determinations to go into court and stop that project cold. . . .
>
> "This phrase 'judicial review' is an appealing concept, but it is not practical. Its purpose is to try to drive a wedge into the effective operation of the Davis-Bacon Act which has been in existence for the past 30-some years."[27]

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24. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 29 (1964).
26. 88 Cong. Rec. 1201-1231 (1964).
27. 88 Cong. Rec. 1201.

The Goodell bill thus was defeated. Congress viewed the administrative procedures then available as entirely adequate. Congress has spoken no differently in this regard since 1964. The intent of Congress could hardly be more clear. The Act does not contain provisions for judicial determination and attempts to amend it in that respect have been defeated. Since the Court of Appeals' reversal of the District Court necessarily would compel the District Court to decide whether work is or is not covered by the Act, what "prevailing rate" classifications are or are not applicable, and, in general, to assume all of the Labor Department and contracting agency's responsibilities in such matters, it is clear that the Court's decision is contrary to the intent of Congress as revealed by the record of its deliberations. As the District Court properly recognized, the District Courts plainly have not been given jurisdiction to decide such matters. Regardless whether or not the District Courts have jurisdiction to enforce express contract specifications freely accepted by the defending party and based on an administrative pre-determination incorporated into the contract, the District Courts plainly do not have jurisdiction to alter existing federal contracts based on the Courts' own perceptions of the Act's requirements.

### B. The Court of Appeals' Decision to Allow District Courts to Make Coverage, Classification and Wage Rate Determinations Departs from All Prior Judicial Opinion

The Davis-Bacon Act is one of three statutes regulating the labor provisions of federal contracts.[28] Each of these statutes vests the Secretary of Labor with definitive authority to construe and apply its terms and to determine coverage.[29] In accord with the obvious legislative intent to vest within the Executive agencies exclusive authority to supervise the labor standards of

28. *See also,* 41 U. S. C. § 35 *et seq.* (the Walsh-Healy Act) and 41 U. S. C. § 351 *et seq.* (the Service Contract Act).

29. *See* 40 U. S. C. § 276c; 41 U. S. C. § 38; 41 U. S. C. § 353a.

federal contracts—via such delegations of authority to the other agencies Labor Secretary may make—the Courts have repeatedly, unequivocally, and forcefully held that agency determinations as to the coverage and scope of federal contract labor provisions are not subject to judicial review. *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 63 Sup. Ct. 339 (1943); *Nello L. Teer* v. *United States,* 348 F. 2d 533, 539-40 (Ct. Cl. 1965) and opinions reviewed by the Attorney General of the United States in March 9, 1979 Opinion of the Attorney General, 58 Daily Labor Report p. D-1 *et seq.* (BNA, March 23, 1979).

Moreover, this Court has ruled that judicial assumption of the Secretary of Labor's authorities under the contracting statutes would constitute a plain violation of the Constitutional separation of powers and would not be permitted. *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 60 Sup. Ct. 869 (1940). *See also, United States* v. *Binghamton Const. Co.,* 347 U. S. 171, 74 Sup. Ct. 438 (1954), citing with approval the first major appellate opinion regarding the Davis-Bacon Act, *Gilloz* v. *Webb,* 99 F. 2d 585 (5th Cir. 1938), which held that a prior determination by the Secretary of Labor that particular work is covered by the Act, and a prior determination as to the rates to be paid for such work, are absolute conditions precedent to recovery of damages based on such rates.

In accord with the foregoing authority is the well-established rule that courts are without jurisdiction to alter the terms of a contract. *United States* v. *Joseph A. Holpuch Co.,* 328 U. S. 234, 66 Sup. Ct. 1000 (1946); *International Association of Machinists* v. *Hodgson,* 515 F. 2d 373 (2nd Cir. 1975); *United States* v. *Smoler Brothers, Inc.,* 187 F. 2d 29 (7th Cir. 1951); *Framlau Corporation* v. *Dembling,* 360 F. Supp. 806 (E. D. Pa. 1973). In accord, the Comptroller General repeatedly has ruled that executed government contracts may not be revised to include even erroneously omitted Davis Bacon Act Stipulations. *E.g.,* Comptroller General Decision B-144901, 40 Comp. Gen. 565 (1961).

Against and despite the foregoing body of judicial opinion, the Court of Appeals in practical effect has held that the District Court has authority not merely to review decisions of the agencies relative to coverage of the Act and classification of work allegedly performed subject to it for rate determination purposes but has authority to render its own decision *de novo* and to amend contracts accordingly; the Court of Appeals in actuality has held that the District Court has authority to usurp the functions of the agencies and Secretary of Labor as to coverage and classification, and, under guise of "implying" provisions of law into contracts effectively may rewrite contract provisions to the detriment of private contracting parties. The Court of Appeals' decision thus is plainly contrary to all precedent, logic and reason, and reverses a forty-five year history of administration of the Act.

### C. The Court of Appeals Erred in Concluding That Davis-Bacon Act Stipulations Were Part of the Contract by Operation of Law, Regardless of Agency Determinations, Because the Act Does Not Operate in the Absence of Agency Determinations

The Court of Appeals' view that the Davis-Bacon Act was incorporated into the contract as a matter of law, and, in turn, that an employee of URA would be permitted to sue on the basis of such contract as amended, fails to appreciate how the Act is constructed and administered.

As noted above, the original Act requiring payment of "prevailing rates" was amended in 1935 to provide for *administrative predetermination* of coverage, classification and rate questions. Those provisions of the Act which provide for inclusion of pre-determined "prevailing rates" specifications in government contracts cannot, therefore, be construed in isolation from other provisions of the Act including the administrative scheme associated with it. The Court of Appeals' error, in holding that pre-

vailing rate specifications were part of the URA/ERDA contract by operation of law, was in ignoring the practical reality that determinations must be made as to what species of projects are "construction," what types of work activities are covered by the terms "mechanic" and "labor" and, what specific "prevailing rates" apply to particular jobs. If the Act is to be meaningfully incorporated into the contract by law, there necessarily must be a parallel incorporation of some legally authorized determination that the work in question was to be "construction," was to be performed by a "mechanic" or "laborer" and would fall within a particular prevailing rate classification. Yet, as was found by the District Court, Mr. Coutu after extensive discovery was unable to show that any such determinations had been made relative to the work performed by him. Moreover, the legislative history and all previous judicial holdings show Congress intended that such determinations are to be made by the contracting agencies and/or the Labor Department in advance of contracting—not by courts (and certainly not by the courts after work has been completed).

Since the agencies have not made a prior determination that the work performed by Mr. Coutu was "construction," or that his job classification was subject to a particular "prevailing rate," and since the District Court plainly has no jurisdiction to decide such questions, incorporation of the Act into the contract is meaningless. Without some *specific* determinations as to coverage, classification and rate, the Act cannot be applied and, in turn, there is nothing for the court to enforce on Mr. Coutu's behalf.

The Court of Appeals noted that the Department of Labor has issued general prevailing rate schedules for the Chicago area including the counties where Fermilab is located (App. 42). The availability of those schedules does not, however, reach the critical issues as to what job classifications and work are covered by the Act and, in turn, covered by such schedules. The Court's lack of focus on these issues proceeds from its failure (unlike

the District Court) to appreciate the fact that because the contract did not contemplate performance of Davis-Bacon Act—covered work by URA employees, some prior and specific determinations that such work was covered had to be made by the agencies in order to activate application of the Act.

Further, and as pointed out by the Solicitor General in the Brief for the United States as Amicus Curiae, the Court of Appeals at least ought to have applied the doctrine of primary jurisdiction if, as it appears to hold, the authority to make coverage and classification decisions is not exclusively the province of the administrative agencies/Department of Labor (Brief for the United States pp. 19-21).[30]

The Court of Appeals' reliance on prior case law incorporating statutory or regulatory terms into contracts by reference is misplaced. None of those opinions involved the Davis-Bacon Act or similar legislation which operates only within the context of pre-contracting administrative determinations. They dealt with matters such as contract termination clause—*G. L. Christian and Associates* v. *United States*, 312 F. 2d 418 (Ct. Cl., 1963) —equal employment opportunity clauses—*United States* v. *New Orleans Public Service Inc.*, 555 F. 2d 459 (5th Cir. 1977)— and the like: *i.e.*, regulatory and statutory provisions which did not require administrative implementation or interpretation in order to be binding on the affected parties.

In short, the Court of Appeals' error was not to recognize that the effect of its decision would be to require the District Court to make after the fact coverage, classification and rate determinations which it is without authority to make.

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30. The Court of Appeals' opinion is contradictory on these questions. At footnote 6 (App. 38) the Court appears to endorse the view that authority to make coverage decisions is accorded exclusively to the Executive agencies or that at least there is an exhaustion requirement. It concluded, however, by remanding that responsibility to the District Court after holding there was no exhaustion requirement (App. 45-46). The Court did not explain this contradiction.

## D. The Court of Appeals' Decision Is Inconsistent with the Express Terms of the Act

Even if there were no legislative history or prior judicial opinion concerning the Act, or established administrative scheme, the Court of Appeals' delegation to the District Court of *de novo,* after the fact coverage, classification and rate determinations, is contrary to the literal terms of the Act.

### 1. The Act Does Not Apply to a Contractor Unless the Bid Specifications Set Forth the Wage Rate Requirements

The Act commences with the direction (40 U. S. C. § 276a-1):

> "The *advertised specifications* for every contract in excess of $2,000, to which the United States . . . is a party . . . shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing . . .;" (Emphasis added.)
>
> (App. 48)

Congress' approach here, obviously was to provide *advance notice,* based on administrative predetermination, as to coverage classification and rates so that the prospective contractor would know precisely what was required. To the same extent that specification, or lack of specification, of design or material requirements would provide notice as to the bases for contracting for such matters, the requirement for specification of labor rates (or the absence thereof) would provide advance notice. For a court to say that the absence of advance notice as to labor rates is no defense to a claim for payment of particular rates is precisely the equivalent of saying that the absence of a particular design, or material specification is no defense to a claim based upon failure to comply with such specification.[31]

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31. The Court's error is compounded in the context of this case, of course, where the contract affirmatively provided for payment of wages at other than the "prevailing" rates claimed by the Respondent.

If that practical consideration were not sufficient, the Act goes on to provide that:

> "every contract *based upon these specifications* shall contain a stipulation that the contractor . . . shall pay all mechanics and laborers . . . computed at wage rates not less than those stated in the advertised specifications, . . ." (Emphasis added.)
>
> (App. 48)

In the plain words of the statute, therefore, a contract cannot be deemed to include "prevailing rate" provisions unless the advertised specifications therefor included such provisions and/or unless the contract was "based upon" such specifications. The Court of Appeals' opinion that the AEC/ERDA-URA contract contained "prevailing rate" specifications by operation of law is therefore a *non-sequitur* because "the law" referred to does not operate in the absence of express provision therefor in the advertised specifications, which are solely within the control of the contracting agency. Since the contractor obviously has no authority to prepare bid specifications, a lawsuit aimed at him for failure of such specifications to prescribe "prevailing rates" obviously is misdirected.

**2. The Act Does Not Apply to the Extent the Government Otherwise Has Established Specific Wage Rates**

Compounding the Court's error in this case is the fact that the contract in question *did* specify wage rates for various classifications of work, including that of electronics technician. (App. 54-59). Therefore, not only was there a total absence of any stipulation of "prevailing" rates based on bid specifications and precontract determinations *there was express provision for the rate by which Respondent Coutu was to have been paid!* Apropos this circumstance, the Davis-Bacon Act provides, at 40 U. S. C. § 276a-3:

> "[This Act] shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates."
>
> (App. 52)

The Court of Appeals dismissed the import of Section 276a-3 by declining to find the AEC/ERDA had authority to set wage rates. However, and apart from the undisputed fact that Federal funds authorized by appropriations legislation were used to pay URA employees, the authority "otherwise granted by Federal law" is as follows:

a) The Atomic Energy Act of 1954 authorized the Atomic Energy Commission to:

> "make arrangements (including *contracts* . . .) for the conduct of research and development activities" (42 U. S. C. § 2051) (Emphasis added.)

b) The same Act authorized the Atomic Energy Commission to enact regulations necessary to implement policies expressed therein. 42 U. S. C. § 2201(p).

c) Pursuant to such authority, AEC/ERDA has adopted regulations governing its contracting, with not-for-profit entities such as URA, including provision for establishment of wage rates. 41 CFR § 9-1.104 *et seq.;* 41 CFR § 9-15.5006.[32]

Thus, AEC/ERDA had been given contracting authority by Congress, including authority to contract with not-for-profit entities such as URA; terms of such contracts required AEC/ERDA to pay all costs of personnel compensation. It is entirely absurd to suggest that AEC/ERDA would not set the wage rates it is paying for, or to deny that Congress gave AEC/ERDA

32. The Court of Appeals responded to this point by arguing that an Executive Order, No. 10789, impliedly withhold from AEC/ERDA authority to set non-Davis-Bacon Act wage rates (App. 45, at footnote 17). The Executive Order, however, merely recites that:

> "The provisions of the . . . Davis-Bacon Act [citing §§ 276a-276a-5 which includes § 276a-3] . . ., if otherwise applicable, shall apply. . . ."
>
> 1958 U. S. Code, Congressional and Administrative News at pp. 5585-6.

Thus, the Court of Appeals' argument circles back upon itself and fails to explain why § 276a-3 should not be considered applicable.

not only the authority, but the *responsibility* to set such rates. Surely Congress would not knowingly authorize AEC/ERDA to pay government funds for employee compensation with no control thereof. This is particularly true in the case of a not-for-profit contractor, such as URA, who does not stand to gain or lose financially because of wage rate levels

The Court of Appeals' opinion that prevailing rate specifications were part of the contract by operation of law thus cannot be supported within, and in fact is inconsistent with, the framework of the Act itself. Here, the contracting agency concluded that the work contemplated by the contract would not be covered by the Act, wrote the contract on the basis of that determination, and established within the contract a schedule of rates which URA would be authorized to pay, using government funds. By law and lawful regulation, AEC/ERDA was authorized to make those decisions and take those actions. No attempt to appeal therefrom has been made, except via the instant action; however, as shown, and as the District Court found, the courts do not have jurisdiction to substitute their judgments for pre-contract agency determinations especially in a post-contracting case. Accordingly, the Court of Appeals' decision is plainly wrong on the law and should be reversed.

## II.

## THE ACT IS NOT ENFORCEABLE THROUGH PRIVATE ACTIONS

The Court of Appeals held that its decision in this case "flows directly" from its decisions in *McDaniel* v. *University of Chicago,* 512 F. 2d 583 (7th Cir. 1975), *vacated and remanded,* 423 U. S. 810 (1975), *reaffirmed on remand,* 548 F. 2d 689 (1977), *cert. den.,* 434 U. S. 1033 (1978). Those decisions held that the Act conferred upon a government contractor's employee an implied private right of action in federal court to enforce Davis-Bacon Act contract stipulations written into a

contract; *i.e.*, the Court's opinions in *McDaniel* were made in the context of a motion to dismiss prior to answer and thus were predicated upon the legal assumption that all allegations of fact—including the allegation that the contract therein did contain such stipulations—were correct.[33]

Following the second *McDaniel* decision, in response to a petition for certiorari, the United States as *amicus curiae* expressed to this Court its view that implication of a private right of action under the Davis-Bacon Act was inconsistent with at least two of the four criteria identified by this Court in *Cort* v. *Ash*, 422 U. S. 68, 78 (1975). Brief of the United States as *Amicus Curiae, University of Chicago* v. *McDaniel*, on petition for certiorari, October Term, 1977, at pp. 29-30. The United States concluded, however, that despite the Court of Appeals' failure to follow this Court's direction in *Cort* v. *Ash*, the *McDaniel* decision was not an appropriate vehicle for review of the right of action issue because it was based upon an assumption that the contract there at issue did contain Davis-Bacon Act stipulations, an assumption which, if incorrect, would necessarily require summary dismissal of the suit in any event. Brief, pp. 30-31. Only after receiving those views, did this Court decline to grant review.

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33. Thus, in its original decision, the Court held:

> "We therefore conclude that plaintiff's complaint, in that it sought to enforce defendant's contractual commitment to pay 'prevailing' wages as determined by the Secretary of Labor, stated a cause of action. . . ." 512 F. 2d at 588.

In its decision on remand, the Court stated:

> "[P]laintiffs-appellants allege that the government contract with appellee *did* contain the prevailing rate requirement. . . . Assuming the facts alleged, the contractor in this case has been unjustly enriched by contracting on the basis of prevailing wage costs, while in fact paying less than the prevailing wage." (Emphasis in the original.) 584 F. 2d 692.

In the instant case, by contrast, the defendant denied that the contract contained such specifications and the District Court granted summary judgment after the Plaintiff conceded he was unable to rebut the denial.

In the instant case, however, the Court of Appeals has gone far beyond its *McDaniel* opinion. Here, it holds not only that the federal courts have jurisdiction over private actions based upon express contract commitments, it has declared that the federal courts may *create* contract obligations even when no such obligation was assumed or even contemplated by the contracting parties, and even in the absence of necessary coverage and classification determinations. In response, the United States as *Amicus Curiae* has re-expressed to this Court its view that the Court of Appeals' decision is inconsistent with at least two of the factors discussed in *Cort* v. *Ash, supra;* the United States also has expressed to the Court its view that the Court of Appeals' extension of the *McDaniel* holding from recognition of a right of action to enforce contracted obligations, to a right of action seeking creation of the obligations *de novo*, is grossly inconsistent with the precepts of the contracting statutes and, as a practical matter, will lead to serious disruption of federal contracting. Brief for the United States as *Amicus Curiae,* pp. 19-23.

The Court of Appeals attempted to justify its recognition of a right of action in this case on the theory that the statutory procedures for enforcement of the Davis-Bacon Act were inadequate (App. 44) and, therefore, that recognition of a private right of action was necessary to achieve the objectives of the Act (App. 44). That approach, substituting the Court's judgment for that of Congress, as to means for achieving the objectives of the Act, is solidly contrary to several recent decisions of this Court. This Court has recognized that it is for Congress, not the Courts, to determine how legislation is to be enforced or administered; the proper question, therefore, is whether or not Congress intended that the policies of the Davis-Bacon Act were to be achieved by private actions or solely by the procedures expressly set forth in the Act. *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* No. 77-1645 (Nov. 13, 1979); *Touche Ross & Co.* v. *Reddington,* No. 78-309 (June 18, 1979); *Cannon* v. *University of Chicago,* 441 U. S. 677

(1979). The Court of Appeals' decisional framework is thus clearly out of step with the views of this Court.

It is clear, moreover, that Congress did not intend that the objectives of the Act were to be achieved via private actions. As shown above, the legislative history of the Act plainly reveals that Congress considered and rejected bills which would have provided individual employees with direct access to the courts for purposes of obtaining judicial review of those administrative determinations upon which the Act operates. If Mr. Coutu's suit were allowed to proceed under the directions given by the Court of Appeals, however, the District Court necessarily would be required to make precisely those types of coverage, classification and rate determinations which Congress decided the courts should leave to the agencies.

It is clear, therefore, that the Court of Appeals' decision contravenes congressional intent and must not be allowed to stand.

Apart from the fact that Congress considered but rejected proposals to give courts authority to resolve the type of issues which are raised by Respondent's complaint, there are other indicia of congressional intent which lead inexorably to the same conclusion. Thus, Congress did, as comprehensively discussed by the Solicitor General on behalf of the United States, provide in the Act procedures for enforcement and an enforcement agency. That Congress did expressly provide means for enforcement presumptively negates any suggestion that other, unstated, means also were provided. *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U. S. 453, 458 (1974). *Brown* v. *General Services Administration,* 425 U. S. 820, 834-35 (1965); *Calhoon* v. *Harvey,* 379 U. S. 134 (1964).

Moreover, the structure of the Act reflects congressional concern with fostering efficiency in government contracting by requiring that bid specifications describe to prospective con-

tractors what is required in the way of labor payments. The concept achieves at least three salutory objectives: one, it removes any uncertainty in the bidding process insofar as labor rates are concerned; two, it fosters uniformity, nationwide, on questions of coverage and application of the Act; and three, it permits projects to proceed without risk of judicial intervention. To permit post-contracting judicial determination as to Davis-Bacon Act coverage and/or application of prevailing rates to particular work projects, obviously would defeat each one of these objectives. Prospective contractors could not rely on agency representations; various courts likely would not be consistent in deciding whether, for example, assembly of a proton-beam target or power supply was "construction" work subject to the Act or experimental work not subject to the Act; and timely completion of projects would be conditional upon the acceptance by each individual employee working thereon, of the agencies' determinations as to application of the Act to his work. Implication of a private right of action as postulated by the Court of Appeals thus not only is inconsistent with legislative intent, it would in practical effect defeat the statutory scheme, and thus must be rejected. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 136 (1968); *Williams* v. *Lee*, 358 U. S. 217, 218 (1959).

## CONCLUSION.

As shown, the Court of Appeals recognition of a private right of action to compel judicial determination of Davis-Bacon Act coverage of specific work projects finds no support in the law and must be reversed.

Respectfully submitted,

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